

**SC96731**

---

**IN THE MISSOURI SUPREME COURT**

---

**CASS COUNTY, MISSOURI**  
**Appellant**

**v.**

**DIRECTOR OF REVENUE**  
**Respondent.**

---

**APPELLANT'S REPLY BRIEF**

---

**BERRY WILSON, L.L.C.**

Marshall V. Wilson, #38201  
Michael G. Berry, #33790  
Theodore L. Lynch, #68221  
BERRY WILSON, L.L.C.  
200 East High Street, Suite 300  
P.O. Box 1606  
Jefferson City, MO 65102  
(573) 638-7272  
(573) 638-2693 (Facsimile)

Attorneys for Appellant

## TABLE OF CONTENTS

<b>TABLE OF CONTENTS .....</b>	<b>i</b>
<b>TABLE OF AUTHORITIES .....</b>	<b>ii</b>
<b>STATEMENT OF ADDITIONAL FACTS.....</b>	<b>1</b>
<b>ARGUMENT.....</b>	<b>2</b>
<b>CONCLUSION AND AMENDED REQUEST FOR RELIEF .....</b>	<b>13</b>
<b>CERTIFICATE OF SERVICE .....</b>	<b>15</b>
<b>CERTIFICATE OF COMPLIANCE .....</b>	<b>15</b>

## TABLE OF AUTHORITIES

<i>Ford Motor Co. v. City of Hazelwood</i> , 155 S.W.3d 795 (Mo. App. E.D. 2005) .....	12
<i>State ex rel. Cass County, Missouri v. Mollenkamp</i> , 481 S.W.3d 26 (Mo. App. W.D. 2015) .....	1
<i>State ex rel. Nat. Inv. Corp. v. Leachman</i> , 613 S.W.2d 634 (Mo. banc 1981).....	11
Mo. Const. Art. IV, § 5 .....	6
Mo. Rev. Stat. § 32.087 .....	6
Mo. Rev. Stat. § 66.620.....	8
Mo. Rev. Stat. § 67.525 .....	2, 6, 7, 8, 9, 10, 12
Mo. Rev. Stat. § 94.550 .....	7
Mo. Rev. Stat. § 139.031 .....	11
Mo. Rev. Stat. § 144.100 .....	2, 4, 5, 6, 9, 10, 12
Mo. Rev. Stat. § 144.190 .....	2, 5, 9, 10, 11, 12
Mo. Rev. Stat. §§ 144.261 .....	1, 3
Mo. Rev. Stat. § 536.150 .....	1, 3
Mo. Rev. Stat. § 621.050 .....	1, 3

## STATEMENT OF ADDITIONAL FACTS

The Director's 10 March 2016 administrative decision, from which Cass County appealed to the AHC, denominates itself as a "final decision by the Director." LF 7. This decision states that "Sections 144.261 and 621.050, RSMo., govern appeals...from any final decision made by the Director of Revenue." LF 7. "To appeal," the decision states, "you must file a petition with the Administrative Hearing Commission within sixty days after the date of this final decision." LF 7.

The Missouri Court of Appeals, Western District, has held that the subject matter of the Director's final decision in this case is reviewable by the AHC under Mo. Rev. Stat. §§ 144.261, 621.050, not by prohibition under Mo. Rev. Stat. § 536.150. *State ex rel. Cass County, Missouri v. Mollenkamp*, 481 S.W.3d 26, 31 (Mo. App. W.D. 2015).<sup>1</sup>

---

<sup>1</sup> The Court of Appeals denied rehearing and transfer on November 24, 2015; this Court denied transfer on March 1, 2016.

## ARGUMENT

The Director argues that taking money out of Cass County's current local sales tax revenue to correct an overpayment to Cass County in preceding years is an unreviewable administrative "adjustment" of an account, not a refund governed by Mo. Rev. Stat. § 144.100.4 (A 21), § 144.190.2 (A 23), and § 67.525 (A 20).

The Director's argument is grounded only in semantics. Of course making Cass County pay back \$966,692.25 in past sales tax revenue from current sales tax revenue is a refund. The manner by which the Director is accomplishing that refund is through a series of accounting transfers—"adjustments," the Director calls them. But a refund is a refund.

The AHC's decision under review disregards the entire body of law requiring strict construction of refund statutes, and disregards statutory restrictions on the Director's authority over local funds under the Director's control. The decision the Director seeks from this Court will grant him authority to treat reviewable decisions—decisions having meaningful financial consequences for local governments—as nothing more than unreviewable account "adjustments."

Here, the Director picked the winners and losers by ignoring safeguards written into the state's revenue laws. At best, granting the Director the authority for which he advocates opens local tax laws to arbitrary application and

uncertainty. At worst, local tax funds will be subject to favoritism by state officials.

**I The AHC had jurisdiction under Mo. Rev. Stat. §§ 144.261, 621.050 (responding to Director’s Point I, pages 47-80).**

The Director commences thirty-three pages of argument thusly: “Never before this controversy has the Director’s processing of an amended sales tax return—an automatic and non-discretionary act triggered by individual tax filers—been considered a final ‘decision’ subject to appeal to the Administrative Hearing Commission.” Director’s Brief at 47. True or not, that mischaracterizes Cass County’s position here and before the AHC.

Cass County challenges the Director’s action in refusing to follow statute governing procedure after KCP&L filed or later files amended returns. More specifically, Cass County challenges the Director’s decision to transfer money out of Cass County’s sales tax account and give it to Lee’s Summit. That decision, the Director asserts, is only reviewable by “writ under Section 536.150 based on the common law.” Director’s Brief at 78.

The Director’s decision is not reviewable by writ under Mo. Rev. Stat. § 536.150. *Mollenkamp*, 481 S.W.3d at 31. The Director’s 10 March 2016 decision states that it is a “final decision,” reviewable by the AHC under Mo. Rev. Stat. §§ 144.261 and 621.050. LF 7.

By this point in the life of this dispute, the AHC's statutory authority to review the Director's 10 March 2016 decision is beyond serious debate. Cass County's remedy—its exclusive remedy—is review by the AHC.

**II The Director is correct in asserting that Mo. Rev. Stat. § 144.100 governs local sales tax returns and amended returns (responding to Director's Brief at 19-22, 80-81).**

The Director states what Cass County has asserted all along: the filing of KCP&L's amended returns, and what happens thereafter, is governed by Mo. Rev. Stat. § 144.100. Director's Brief at 19-21, 80-81.

The Director begins by acknowledging that amended returns are permissive—they “may be made by the filer [KCP&L, in this instance].” Director's Brief at 20, citing Mo. Rev. Stat. § 144.100.5. Nothing compels KCP&L to file amended returns or to petition for a refund of local sales taxes which the Director asserts Cass County was overpaid. KCP&L's obligation to pay Lee's Summit for taxes collected under Lee's Summit's local tax ordinances is not altered by whether KCP&L chooses to file amended returns or chooses to recover any overpayment from Cass County. Neither the Director nor Lee's Summit argue otherwise.

The Director next asserts and Cass County agrees that amended returns may be filed to correct “all matters contained in the [original] return.” Director's Brief

at 20, quoting Mo. Rev. Stat. § 144.100.5. That includes correcting erroneous codes which resulted in any overpayment to Cass County in prior years.

The Director then deftly attempts to shift course in his Brief away from § 144.100—failing completely to address the filer’s remedies prescribed within that statute. Instead of addressing express statutory remedies, the Director explains what his staff does. “When a filer misdirects tax funds because of a coding error on its return it may file an amended return, and the re-allocation will be posted promptly and automatically [with] dynamic changes to the funds in the relevant state accounts.” Director’s Brief at 20-22.

That procedure is contrary to § 144.100.4. When a taxing jurisdiction is overpaid based on erroneous returns and would owe the filer a refund or credit based upon a corrected return, the filer, KCP&L, must still first apply for a refund.

“If a refund or credit results from the filing of an amended return, no refund or credit shall be allowed unless an application for refund or credit is properly completed and submitted to the director pursuant to section 144.190.” Mo. Rev. Stat. § 144.100.4 (emphasis added). See Cass County’s Brief at 20-21.

The Director is wrong in asserting that § 144.100 is one of “two state statutes” granting the Director authority “to process amended returns that result in adjustments to local tax accounts.” Director’s Brief at 81. When read in its entirety, Mo. Rev. Stat. § 144.100.4, plainly prohibits a refund after filing amended



returns, unless and until the filer applies for a refund under § 144.190. The other laws cited by the Director (Mo. Const. Art. IV, § 5, and Mo. Rev. Stat. § 32.087.6), do not state or imply that the Director has authority to do anything but strictly comply with express requirements with § 144.100.4.

The express requirements of law and the practice of the DOR are irreconcilably in conflict and the AHC's ruling to the contrary must be reversed.

There is no textual justification for implying the Director has authority to do what is expressly precluded by statute, § 144.100.4. Neither the Director nor Lee's Summit cite any authority for the Director to waive the requirement in § 144.100.4, which states unambiguously that KCP&L must first file for a refund before there is a refund. The mandatory language within § 144.100.4 precludes the Director from fashioning an alternative non-statutory remedy called an "adjustment." The following discussion further explains with additional authority why this is so.

**III Mo. Rev. Stat. § 67.525, is additional evidence of legislative intent that the Director's authority to pay money from Cass County's sales tax fund to anyone but to Cass County depends upon first receiving and granting a refund petition from KCP&L (responding to Director's Brief at 85-86; Intervenor's Brief at 1).**

If the language of § 144.100.4 were not clear enough, there is one more law barring the Director from transferring funds out of Cass County's account to Lee's

Summit. It is found in Mo. Rev. Stat. § 67.525, which is part of the County Sales Tax Act, Mo. Rev. Stat. §§ 67.500-545.

There are only two things which § 67.525 permits the Director to do with funds in the county's sales tax account. Neither includes making transfers ("adjustments," to borrow the Director's word) which result in any County's current sales tax revenues being sued to remedy the result of past sales tax reporting errors. The explicit and narrowly written text of § 67.525 demonstrates that the broad scope of implied authority asserted by the Director and found by the AHC is unlawful.

The AHC found that the City Sales Tax Act, § 94.550.2, authorized the Director to pay Cass County's sales tax collections to Lee's Summit, even in the absence of an approved refund petition by KCP&L. LF 28-29. Cass County cannot explain why the AHC cited to the City Sales Tax Act when the Director's authority over Cass County's sales tax fund is created by the County Sales Tax Act. In particular, § 67.525.

The intervenor, Lee's Summit, asserts without support that funds collected from local sales taxes on utilities are not subject to the County Sales Tax Act. Intervenor's Brief at 1. However, there is only county sales tax funds expressly exempted from the Director's control under the County Sales Tax Act—taxes

collected under Mo. Rev. Stat. § 66.620 (creating a different fund applicable to St. Louis County).

The Director asserts that § 67.525 “speaks to the broader legislative intent to give the Department administration power to correct accounts informally, even in the absence of refunds.” Director’s Brief at 86. The language of § 67.525 proves the exact opposite point.

The first of two acts authorized by § 67.525 is mandatory. The Director has a duty to pay money in the county fund to each county which imposes a local sales tax, in the manner and at times prescribed. § 67.525.1. This payment the Director “shall” make. *Id.*

The second act authorized by § 67.525 is permissive. The Director<sup>2</sup> “may authorize...refunds from the amounts in the trust fund and credited to any county

---

<sup>2</sup> Cass County does not believe it necessary to reach the constitutional issue addressed by the AHC, LF 30-31. Whether the Director or the Treasurer is the official in charge of refunds out of the county sales tax fund is of no consequence here. Under either the statute as written or under the AHC’s interpretation, no official is given authority to do anything with the funds except two things: distribute them to the taxing entity or authorize a “refund.”

for erroneous payments and overpayments.” Mo. Rev. Stat. § 67.525.2 (emphasis added).

The grant of permissive authority in § 67.525.2 does not—contrary to what the Director asserts and the AHC implicitly found—open up more creative possibilities. The statute authorizes a “refund” and that is all. This language, when read together with § 144.100.4 (which predicates the granting of a refund on applying for a refund under § 144.190), can mean only that the Director is not required to authorize a refund out of a county’s funds held in trust. The Director “may” authorize such a payment if a refund has been sought and granted as § 144.100.4 and § 144.190 require. Or, one can infer that the Director “may” also choose to do nothing (leaving the taxpayer to collect its refund directly from the county if the Director deems that best or if the county’s fund has insufficient cash on hand). Nothing in § 67.525.2 suggests a more expansive reading, even if that would be advantageous for the Director. The existence of § 144.100.4 is further evidence of legislative intent against implying any broadening of the very limited authority granted by conferred by § 67.525.2.

Finally, the Director asserts that because KCP&L remitted the correct amount of tax but simply overpaid Cass County by coding the taxing jurisdiction incorrectly, that an “adjustment”—not a refund—is the remedy. Director’s Brief at 86-88.

The only authority the Director cites is the Order of the AHC itself. The Director alludes to “statutes mentioned above governing...revenue administration and adjustments.” Director’s Brief at 88 (emphasis added). However, the Director’s Brief does not cite any statutes speaking to “adjustments” which take funds out of one county’s account and give them to a different jurisdiction.

It is not possible to read § 144.100.4 and § 67.525 together and conclude that the Director can authorize anything to be done with funds in Cass County’s local sales tax fund except pay them to Cass County or pay them to back to a filer who has obtained a favorable ruling on a refund petition under §144.190.

**IV The Director’s argument about the havoc a decision for Cass County will cause is neither persuasive nor does it justify ignoring statutory limits on the Director’s authority (responding to Director’s Brief at 74-77).**

The Director forecasts a Pandora’s box full of trouble opening up in the Truman Building should the Court decide this case for Cass County. Director’s Brief at 74. The Director is in effect making a practical argument for the General Assembly to amend the governing statutes and thereby grant the Director discretion which the current law denies. He is not making an argument for the strict textual interpretation of current law.

The Director’s solution to the problem caused by KCP&L’s errors is processing 36 separate amended returns over a period of 36 months. Tr. 51-53.

That hardly seems more efficient than letting KCP&L file amended returns and petition for a refund. All statutory procedures for those steps are in place, and it is for Lee's Summit and KCP&L to resolve the obligations owing to Lee's Summit.

Incorrectly, the Director asserts that Cass County's writ in circuit court prevented KCP&L from filing amended returns. Director's Brief at 32. All Cass County sought in circuit court—and all the circuit court did for Cass County—was grant prohibition “prohibiting Director from taking any action...unless and until KCPL files an application for refund under section 144.190.” *Mollenkamp*, 481 S.W.3d at 28-29.

Following procedures set by law, instead of making up different ones, serves efficiency, fairness, and consistency.

At pages 13-14 of its Brief, Cass County cited a number of cases holding that statutes authorizing refund of a local tax are “strictly construed” in favor of the taxing entity. There are many more. Two additional citations bear mention based on the Director's arguments in favor of informalizing the refund process.

The statute governing refund of local real estate taxes, Mo. Rev. Stat. § 139.031, requires that the taxpayer protest at the time of payment or lose its right to a refund. The statute does not permit filing the protest separately from the payment, even if both are timely. *State ex rel. Nat. Inv. Corp. v. Leachman*, 613

S.W.2d 634, 635 (Mo. banc 1981). See also *Ford Motor Co. v. City of Hazelwood*, 155 S.W.3d 795, 799 (Mo. App. E.D. 2005).

These strict procedures—like the refund procedures in Chapter 144—are in place to protect the recipient of the tax by requiring the payer to be both vigilant as to its rights, and diligent in following the law to protect them. In *Hazelwood*, as a result of Ford’s failure to file notice of protest at the time of payment, the Court denied Ford’s refund because the payment and protest were separately submitted, even though both were timely. The Court explained that as a result of receiving the funds separately from the protest “Hazelwood did not impound any portion of the fee” as required and presumably did what Cass County did, use the tax money to fund local government. *Id.*

Unless and until the local sales tax remitter files a petition for refund, the taxing jurisdiction is entitled to rely upon its stream of income. If local sales taxes are to be subject to automatic “adjustment” whenever the Director sees fit, the statutes governing KCP&L’s rights and obligations, § 144.100.4, and § 144.190, become meaningless. So does § 67.525, the statute which protects Cass County’s funds in the Director’s custody against misapplication.

The Director advocates violating the cardinal rule of statutory interpretation, which requires that “legislation should be given effect as written and courts are

precluded from amending by judicial construction a statute clear on its face.”

*Leachman*, 613 S.W.2d at 635.

Because the statutes governing this dispute address how and when a body of local government must repay local sales tax money, they must be strictly construed in Cass County’s favor, just as any other statute governing refunds of local taxes.

It is inescapable that the Director here has overstepped his statutory authority. He has used his position to pick the winners and losers in a dispute over funds the Director holds only in trust for Cass County. He is thereby exercising control over those funds contrary to law.

Preventing this sort of favoritism and worse by state officials in charge of vast sums of money is precisely why many of the state’s revenue laws are in place. This is also why Missouri’s revenue laws include what may seem at first impression to be cumbersome procedural safeguards.

### **CONCLUSION AND AMENDED REQUEST FOR RELIEF**

For all reasons herein and previously addressed, Cass County asks the Court to reverse the AHC’s decision and hold the Director’s decision of 10 March 2016 to be invalid.

On information and belief, the Director has begun taking Cass County’s sales tax money and paying it to Lee’s Summit. Cass County requests that any



decision by the Court favorable to Cass County address the procedural means to remedy the taking of its funds.

BERRY WILSON, L.L.C.

/s/ Michael G. Berry

Michael G. Berry, #33790

Marshall V. Wilson, #38201

Theodore L. Lynch, #68221

200 East High Street, Suite 300

P.O. Box 1606

Jefferson City, MO 65102

(573) 638-7272

(573) 638-2693 (Facsimile)

michaelberry@berrywilsonlaw.com

marshallwilson@berrywilsonlaw.com

theodorelynch@berrywilsonlaw.com

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served electronically upon all counsel of record on this 27<sup>th</sup> day of March, 2018.

/s/ Michael G. Berry  
Michael G. Berry

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with Rule 84.06(b) and contains 2,905 words and 253 lines, excluding the cover, certificate of service, certificate of compliance, signature block and appendix; and that the brief contains words in 14 point Times New Roman.

/s/ Michael G. Berry  
Michael G. Berry